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IN THE
COURT OF APPEALS OF INDIANA

ALLSTATE INSURANCE COMPANY, Appellant-Defendant,	)	
vs.	)	No. 45A03-0603-CV-116
PATRICIA ZDONEK, Appellee-Plaintiff,	)	
CARL FALASHETTI, (Defendant below).[1]	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Judge
Cause No. 45D10-0305-CT-99

January 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

[1] Defendant Carl Falashetti is not seeking relief on appeal and has not filed a brief as appellant or appellee. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

Case Summary

Appellant-Defendant Allstate Insurance Company ("Allstate") appeals the denial of its Motion for Determination of Credits and Reductions regarding the judgment awarded to Appellee-Plaintiff Patricia Zdonek ("Zdonek"). We reverse and remand with instructions.

Issue

Allstate raises the singular issue of whether the trial court erred in denying its Motion for Determination of Credits and Reductions.

Facts and Procedural History

On May 5, 2001, Zdonek was a passenger in a car driven by her daughter, Karla, heading westbound on 61st Avenue in Hobart, Indiana. Carl Falashetti ("Falashetti") was driving in the opposite direction on 61st Avenue when James Woodside ("Woodside") pulled his car out in front of Falashetti's from a private drive. To avoid colliding with Woodside's car, Falashetti swerved left of center causing a head-on collision with Karla's car. As a result of the crash, Zdonek sustained serious physical injuries.

State Farm insured Woodside up to $50,000, which was paid to Zdonek. Karla had insurance through Chicago Motor Club Insurance Company ("Chicago Club Insurance") with a coverage limit of $100,000. Zdonek unsuccessfully sought recovery under the underinsured provision of the Chicago Club Insurance policy.

Zdonek was insured under two policies, an umbrella and an automobile, issued by Allstate. Together these policies provided underinsured motorist coverage in excess of $1,100,000.

Zdonek filed an action against Allstate, Falashetti, and Chicago Club Insurance. The

claims against Chicago Club Insurance sought payment of the coverage under Karla's policy and alleged bad faith on the part of Chicago Club Insurance for the delay in payment. These claims were settled for $45,000, calculated by reducing the $100,000 coverage by the $50,000 payment made by State Farm and $5,000 previously paid by Chicago Club Insurance towards Zdonek's medical expenses.

Because the contested issues that would be presented to the jury only involved the determination of the negligence of Falashetti and of any non-party and the extent of Zdonek's damages resulting from the accident, the trial court restricted the submission of evidence or reference relating to any of the insurance policies involved. After the trial concluded on March 17, 2005, the jury returned a verdict for Zdonek in the amount of $1,080,000, finding 100% of fault rested with Woodside, a nonparty. The order of the trial court included in part:

> IT IS THEREFORE ORDERED, ADJUDICATED AND DECREED, that Plaintiff, Patricia Zdonek, recover the sum of One Million Eighty Thousand and no/100 ($1,080,000) Dollars of and from the Defendant, Allstate Insurance Company, plus interest at a rate of eight percent (8%) per annum. Costs versus Defendant. This Judgment is subject to revision as to interest and any credits or off-sets that Allstate Insurance Company may be entitled to pursuant to the applicable policies of insurance.

Appellant's Appendix at 22.

The next day, Allstate filed a Motion Re: Payment of Judgment, Distribution of Payment and Satisfaction of Judgment, which requested that Allstate be allowed to deposit $1,080,000 with the clerk of the court, who then would only pay out $975,236.70 to Zdonek until alleged credits were determined. Allstate contended that it was entitled to a credit or setoff totaling $105,000 due to the $50,000 payment by State Farm, $5,000 medical and $45,000 coverage payments by Chicago Club Insurance, and $5,000 medical payment by

Allstate. That same day, the trial court issued an order permitting this arrangement as long as the remaining $105,000 was held in an interest-bearing account until the trial court made a final determination regarding credits.

On March 24, 2005, the clerk paid Zdonek $975,236.70. Zdonek later filed a Motion for Payment of Judgment, seeking payment of the remaining $105,000 plus interest and costs. On May 27, 2005, Allstate filed a Motion for Determination of Credits and Reductions again claiming it was entitled to a $105,000 credit for pre-trial payments made to Zdonek. Zdonek then filed a motion to strike Allstate's motion and for a summary ruling on her Motion for Payment of Judgment.

On February 10, 2006, the trial court entered an order denying Zdonek's motion to strike as well as Allstate's motion for determination of credits and reduction. The order also instructed the clerk to pay Zdonek the rest of the judgment that had been retained in an interest-bearing account. Allstate now appeals.

Discussion and Decision

I. Standard of Review

Allstate argues that the trial court improperly denied its motion for determination of credits upon the payments received by Zdonek prior to trial, because Zdonek's Allstate insurance policies provide for setoffs and credits for these payments. Neither party disputes the salient facts, so we must determine whether the trial court properly denied this motion as a matter of law. Dawson v. Estate of Ott, 796 N.E.2d 1190, 1195 (Ind.Ct.App.2003). In reviewing questions of law, we apply a de novo standard of review. Id.

II. Analysis

Allstate contends that the trial court improperly denied its motion for determination of credits and setoffs because Zdonek's Allstate insurance policies provide for such credits and setoffs for the pretrial payments totaling $105,000. Zdonek claims that because Allstate's response to Zdonek's request for admissions was that Allstate had no defenses that applied to Zdonek, Allstate is now estopped from requesting credits/setoffs. We disagree.

Indiana Trial Rule 36 governs requests for admission. The purpose of requests for admission is to conclusively establish facts. Fairland Recreational Club, Inc. v. Indianapolis Downs, LLC, 818 N.E.2d 100, 103 (Ind. Ct. App. 2004). The requesting party bears the burden of artfully drafting a statement of facts contained in a request for admission in a manner that is precise, unambiguous, and not misleading to the answering party. Id.

Zdonek cites Walker v. Employers Ins. Of Wausau, 846 N.E.2d 1098 (Ind. Ct. App. 2006), that held in part that because the insurer, Wausau, admitted that none of the policy exclusions applied to the insured, Walker, the insurer was estopped to assert any policy exclusions. The Walker Court noted that prior cases have not specifically defined the term policy defenses, but used the terms 'policy defense' and 'policy exclusion' interchangeably. Id. at 1102. Based on its review of the existing caselaw, the Walker Court concluded that while a policy defense might not always be a policy exclusion, e.g. statute of limitations, a policy exclusion is always a policy defense.[2] Id.

The case at hand involves a setoff/credit provision, not a policy exclusion. A policy

[2] Zdonek cites Walker for the proposition that "[policy defenses] take many forms, including, without limitation, conditions precedent, exclusions, definitions of terms, or other provisions of a policy that limit the existence, scope, or amount of coverage, benefit, or other obligation of the insurer." Appellee's Br. at 8. However, this language is from Trigg v. State Farm Mut. Auto. Ins. Co., 129 P.3d 1099, 1102 (Colo. App.

exclusion denotes what situations the policy does not cover. When a setoff or credit applies, the insurance policy does provide coverage for the accident/damage. However, the insurer's coverage liability is reduced by amounts either advanced by the insurer prior to a determination of coverage or paid by other responsible parties.

The request for admission read: "Admits that no defenses under Allstate policy [Number] apply to plaintiff Patricia Zdonek in this matter." App. At 206. A "defense" is "a defendant's stated reason why the plaintiff or prosecutor has no valid case." Black's Law Dictionary 430 (7th ed. 2001) (emphasis added). A setoff or credit does not invalidate a plaintiff's case; however, if the setoff is large enough, it could eclipse all coverage. Allstate has never claimed nor do the setoffs and credit sought in this case render Zdonek's case invalid. Accordingly, Allstate's admission does not estop it from seeking credits and setoffs pursuant to the policies it issued to Zdonek.

Zdonek also contends that Allstate is not entitled to setoffs because Allstate did not sustain its burden of proof establishing that without the setoff there would be double recovery. Zdonek's argument and supporting caselaw is misplaced. Zdonek relies on Marquez v. Mayer, 727 N.E.2d 768 (Ind. Ct. App. 2000), trans. denied. However, Marquez involves a setoff resulting from funds a plaintiff received from a settling tortfeasor when the plaintiff's injury resulted from the actions of multiple tortfeasors. Id. at 774. The case at hand does not involve multiple tortfeasors as the jury found only one person at fault, Woodside. Furthermore in Marquez, the source permitting a setoff was a commonlaw rule.

2005), which was quoted by Walker in a footnote to support its conclusion that policy exclusions are policy defenses. Such a reference does not convert this Colorado caselaw into Indiana precedent.

Allstate is requesting a setoff based on an entirely different situation, the terms of a contract to which Zdonek agreed to abide. Therefore, the commonlaw rule from Marquez has no application here, because the terms of the contract determine whether a setoff is permitted.

Allstate admitted, as denoted in the pretrial order, that Zdonek's Allstate insurance policies' underinsured motorist provisions applied, Woodside qualified as an underinsured motorist, and Zdonek was injured as a result of the accident. The contested issues of fact for the jury were the negligence of Falashetti, the negligence of any non-party, and the nature, extent, and cause of Zdonek's damages. Accordingly, the trial court restricted the reference to or submission of evidence regarding insurance, reserving the determination of setoffs and credits for a post-trial ruling. Construction of the terms of a written contract is a pure question of law for the court. Indiana Ins. Co. v. Dreiman, 804 N.E.2d 815 (Ind. Ct. App. 2004), trans. denied. Upon its motion for a determination of credits and reductions, Allstate was entitled to such a determination by the trial court in accordance with the provisions of Zdonek's policies. Consequently, we examine the relevant portions of Zdonek's umbrella and automobile insurance policies to determine whether the provisions require a credit or setoff for Allstate.

Due to the characteristic disparity of bargaining power between the parties to insurance contracts, courts have developed distinct rules of construction for insurance contracts. Auto-Owners Ins. Co. v. Harvey, 842 N.E.2d 1279, 1283 (Ind. 2006). If a contract is clear and unambiguous, its language is given its plain meaning. Id. However, if there is ambiguity, the contract is construed strictly against the insurer, and the language of the policy is viewed from the insured's perspective. Id.

A. Credit

Pursuant to the medical payments coverage portion of the automobile policy, Allstate paid $5,000 to Zdonek's healthcare providers on her behalf. Allstate asserts that this payment must be credited against its underinsured motorist liability as an advance payment.

The relevant portion limiting the liability under the medical payments coverage provides:

> There will be no duplication of payments made under the Bodily Injury Liability Insurance, Uninsured Motorists Insurance, and Automobile Medical Payments coverage of this policy. All payments made to or on behalf of any person under this coverage will be considered as advance payments to that person. Any damages payable under the Bodily Injury Liability Insurance or Uninsured Motorists coverages of this policy will be reduced by that amount.

App. at 154.

Allstate paid the $5,000 under the automobile medical payments coverage on behalf of Zdonek, who was covered under the policy. Under such a provision allowing the insurer to offset payments under medical coverage against payments under liability coverage, the insurer has the burden of establishing that a liability judgment actually included the medical expenses that were paid by the advancement. Crabtree v. Estate of Crabtree, 837 N.E.2d 135, 142 (Ind. 2005). Zdonek submitted to the jury as Trial Exhibit 6(A) all of her past medical bills resulting from the accident. By submitting all of her bills, the medical expenses that were covered by the advancement were included in the evidence presented to the jury. Furthermore, the trial court prohibited any evidence at trial relating to insurance policy or payments, making the jury's verdict a determination of Zdonek's aggregate damages. Therefore, the medical expenses covered by Allstate's advance payment were included in the

jury's verdict, entitling Allstate to a credit of $5,000.[3]

B. Setoffs

In addition to the pretrial payment made by Allstate, Zdonek received insurance payments from State Farm, Woodside's insurer, and Chicago Club Insurance, Zdonek's daughter's insurer. We address each payment in turn.

State Farm paid Zdonek $50,000 in liability limits under the policy it issued to Woodside. Woodside was later determined by the jury to be 100% at fault for the accident in which Zdonek sustained her injuries.

Zdonek's Allstate automobile policy[4] contains the following provision under "Limits of Liability":

> The limits of this Uninsured[5] Motorists Insurance shall be reduced by:
>
> 1. all amounts paid or payable by or on behalf of any persons or organization that may be legally responsible for the bodily injury for which the payment is made, including, but not limited to, any amounts paid under the bodily injury liability coverage of this or any other insurance policy.

App. at 156.

The $50,000 paid to Zdonek by State Farm falls within this provision as this payment was made on behalf of Woodside, who was found legally responsible for Zdonek's bodily injuries. Therefore, Allstate is entitled to a setoff for State Farm's $50,000 payment.

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[3] Zdonek argues Allstate has not fulfilled its burden because the jury could have on its own will discounted past medical expenses, assuming those past expenses would be paid independent of the trial and its verdict. Our Supreme Court has repeatedly stated, "we will not attempt to interpret the thought process of the jury in arriving at its verdict." Tincher v. Davidson, 762 N.E.2d 1221, 1224 (Ind. 2002). We decline Zdonek's invitation to muse on what basis the jury determined the damages award.

[4] Zdonek's Allstate umbrella policy includes an identical provision.

Chicago Club Insurance also made two payments to Zdonek pursuant to a policy issued to Zdonek's daughter, Karla. The coverage was up to $100,000 in underinsured motorist coverage and $5,000 in medical payments coverage. Prior to the settlement between Chicago Club Insurance and Zdonek, Chicago Club Insurance paid out $5,000 under the medical payments coverage. The settlement figure was determined by subtracting a setoff for the State Farm liability payment and a credit for the $5,000 medical payment from the $100,000 liability limit. Allstate contends that it is entitled to a setoff for the $5,000 medical payment and the $45,000 coverage payment.

Zdonek's Allstate automobile policy provides in part:

> **If There is Other Insurance**
>
> If the insured person was in, on, getting into or out of, or on or off a vehicle you do not own which is insured for uninsured motorists, underinsured motorist, or similar type coverage under another policy, coverage under Uninsured Motorists Insurance, Part 3, of this policy will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limits, we will pay up to your policy limit, but only after the other insurance has been exhausted. No insured person may recover duplicate benefits for the same element of loss under Uninsured Motorists Insurance, Part 3, of this policy and the other insurance.

App. at 156.

Zdonek was in Karla's vehicle covered, including underinsured motorist coverage, by a policy issued by Chicago Club Insurance. Again, the verdict and award of damages the jury returned was representative of the total amount of damages Zdonek incurred due to the accident. Chicago Club Insurance's total payment of $50,000 ($5,000 medical and $45,000 underinsured motorist coverage) covered a portion of Zdonek's loss. If a setoff were not

[5] An Uninsured Auto is defined in the policy to include an underinsured motor vehicle.

given to Allstate for these payments, Zdonek would recover more than the amount of damages determined by the jury, duplicating a portion of the recovery. Therefore, in accordance with the above nonduplication provision, Allstate is entitled to a setoff in the amount of $50,000 for the amounts paid to Zdonek by Chicago Club Insurance.

C. Total of Credit and Setoffs

Based on the above analysis, Allstate is entitled to $105,000[6] in credit and setoffs due to pretrial payments made to Zdonek under all of the insurance policies providing coverage for this vehicular collision. Accordingly, we remand for the trial court to order the clerk of court to pay Allstate the sum of $105,000 from the interest-bearing account plus any interest earned on that amount to the date payment is made.

Conclusion

The ruling of the trial court denying Allstate's motion for determination of credits and reductions is reversed. Pursuant to the provisions of Zdonek's insurance policies, Allstate is entitled to $105,000 in credit and setoffs due to pretrial payments made to Zdonek. We remand with instructions to grant Allstate a credit and setoffs totaling $105,000 in light of this opinion.

Reversed and remanded with instructions.

RILEY, J., and MAY, J., concur.

[6] $5,000 paid by Allstate under medical coverage, $50,000 paid by State Farm, and $50,000 paid by Chicago Club Insurance